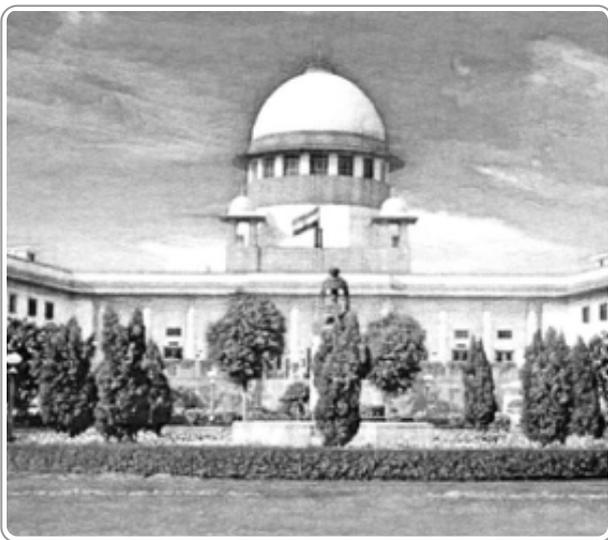


The Applicability Of Amendments To Pending Arbitration Proceedings: The Supreme Court's Decision



The long-standing debate with respect to the applicability of the amended provisions of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) received some clarity on 15 March 2018, when the Supreme Court of India in *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors.* [\[1\]](#) and other similar petitions decided on the issue. The question

before the Apex Court was whether the 2015 amendments to the provisions of the Arbitration Act would apply to arbitrations or arbitration-related court proceedings that already existed on the date of coming into force of the amendments i.e., 23 October 2015.

In our September 2016 newsletter, [\[2\]](#) we explained the position taken by the Bombay High Court in the same matter. We also explained that various other High Courts differed from the Bombay High Court's view on the issue. The Supreme Court has now considered the various positions possible on the issue and upheld the Bombay High Court's decision.

The Supreme Court decision will have a major impact on all pending arbitration matters, including on pending challenges to arbitral awards.

What did the Supreme Court decide?

In a nutshell, the Supreme Court has held that the amendments to the

Arbitration Act will apply to: (a) arbitral proceedings (before the arbitral tribunal) commenced on or after the date of the amendments coming into force; and (b) applications (arbitration-related court proceedings) filed on or after the amendments came into force, even where the arbitral proceedings were commenced before the amendments came into force.

However, the Supreme Court has also held that, in at least certain circumstances, the amended provisions of the Arbitration Act will apply even to applications (arbitration-related court proceedings) pending on the date of commencement of the amendments.

What did the Supreme Court consider?

To reach its final determination, the Supreme Court considered the contentions raised by the opposing parties. Parties arguing that the amendments to arbitration-related court proceedings were applicable to arbitrations commenced before the amendments came into force contended that the unamended Arbitration Act created vested rights – therefore, a new law in the form of amendments to the Arbitration Act could not be applied retrospectively. On the other hand, the parties opposing the same argued that procedural amendments to the Arbitration Act could be applied retrospectively.

The Apex Court also took into consideration various other acts, judgments and authorities while making its decision, as well as the Parliamentary debates and Law Commission Report that preceded the passing of the amendments to the Arbitration Act.

What was the Supreme Court's reasoning?

The Supreme Court was clear that the amendments to the Arbitration Act are prospective and not retrospective. However, the court did not use the word “prospective” in the commonly understood sense.

The Supreme Court made a bifurcation between arbitral proceedings and court proceedings in relation to arbitration proceedings. The court held that arbitration-related court proceedings would not be viewed as a continuation of arbitral proceedings, but would be viewed separately. The court did not make any further bifurcation based on when the arbitration award was passed.

Accordingly, the court held that amendments to the Arbitration Act would apply “prospectively” to arbitration proceedings commenced on or

after the commencement of the amendments. Further, the amendments would apply “prospectively” to arbitration-related court proceedings commenced on or after commencement of the amendments (even where the arbitration was commenced before the amendments came into force).

What is the effect of the Supreme Court decision on pending arbitration matters?

Section 34 of the Arbitration Act permits an aggrieved party to challenge an arbitral award by filing a petition in court. Before the amendment of the Arbitration Act, the filing of a Section 34 petition would automatically lead to the stay of court proceedings for execution of the arbitral award under Section 36 of the Arbitration Act. The amendments to the Arbitration Act remove this automatic stay and require a separate application to be filed to seek a stay of execution proceedings. This application may require a deposit to be made, and will only be granted at the discretion of the court instead of being routinely applied.

The Supreme Court decision means that even for pending arbitration proceedings commenced before the amendments to the Arbitration Act were brought into force, the amended provisions of the Section 36 of the Arbitration Act will apply. In other words, even if an arbitration had already started before the amendments were enacted, no automatic stay will apply if an application is filed challenging the award in such proceedings.

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execution proceedings that have already been automatically stayed after the filing of Section 34 petitions will now resume unless

The Supreme Court has even gone so far as to say that the amended provisions of Section 36 should apply even where an application under Section 34 has been filed before the Arbitration Act was amended.

The Supreme Court decision therefore confirms the Bombay High Court decision completely. As mentioned in our previous newsletter, this means that execution proceedings that have already been automatically

separate stay
applications are filed

stayed after the filing of Section 34 petitions will now resume unless separate stay applications are filed.

What has the Supreme Court said about the Arbitration and Conciliation (Amendment) Bill, 2018?

During the course of the Supreme Court hearing, one of the parties mentioned to the court that the cabinet has recently approved the Arbitration and Conciliation (Amendment) Bill, 2018 (2018 Amendment Bill). Although it appears that the text of this bill is not publicly available on official government websites, a government press release [\[3\]](#) states that Section 87 of the 2018 Amendment Bill seeks to apply the 2015 amendments to the Act only to arbitration proceedings commenced on or after commencement of the 2015 amendments and only to court proceedings arising out of arbitration proceedings commenced on or after the 2015 amendment date.

The Apex Court strongly suggested that this new Section 87 not be enacted, as it would defeat the purpose of the 2015 amendments to the Arbitration Act inasmuch as it would lead to delays in the disposal of arbitral proceedings by increasing the interference of the courts.

What steps does the Supreme Court decision require one to take now?

It is clear that the Supreme Court has interpreted the amendments to the Arbitration Act purposively, in order to give effect to the intention of the parliament to address the unfairness of the unamended Arbitration Act provisions. The judgment is bound to be treated as the most authoritative on the debated issue of the applicability of the amended Arbitration Act.

However, for individuals and companies involved in arbitration, the Supreme Court judgment means that even for pending arbitration proceedings, they must comply with the amended provisions

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of the Arbitration Act with respect to new arbitration-related court proceedings and court applications. In the case of pending Section 34 proceedings, the stay against execution of arbitral awards obtained by institution of these proceedings will not continue – new applications will have to be filed to request that such a stay be continued.

It will be interesting to see whether the government takes heed of the Supreme Court suggestion regarding its proposed 2018 Amendment Bill. But until such time as this bill becomes a law, parties will have to fully comply with the Supreme Court decision.

the Supreme Court judgment means that even for pending arbitration proceedings, they must comply with the amended provisions of the Arbitration Act with respect to new arbitration-related court proceedings and court applications

- **By Soura Ghosh (Associate Partner) and Parinaz Nagporwala (Associate)**

Editor: Krishna Hariani

[1] SLP (C.) No. 19545-19546 of 2016.

[2] [Hariani & Co. Legal Update \(September 2016\) : Amendments To The Arbitration Act And Their Applicability To Pending Court Proceedings.](#)

[3] Press release dated 7 March 2018.

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Please note the new Hariani & Co. Mumbai address:

Bakhtawar, 7th Floor, Ramnath Goenka Marg, Nariman Point, Mumbai
400021